

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD SHERMAN,

Plaintiff,

HAROLD WICKHAM, *et al.*,

Respondents.

Case No. 3:21-cv-00168-ART-CSD

**ORDER OVERRULING DEFENDANTS'
OBJECTIONS TO MAGISTRATE
JUDGE DENNEY'S REPORT AND
RECOMMENDATION (ECF NO. 63).**

Plaintiff Donald Sherman (“Sherman”), who is incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), brings this action pursuant to 42 U.S.C. § 1983 against Defendants Harold Wickham, Kim Thomas, William Gittere, Brian Williams, William Reubart, David Drummond, and Tasheena Cooke (collectively, “Defendants”). (ECF No. 57 (First Amended Complaint)). Before the Court is Defendants’ Objection (ECF No. 63) to Magistrate Judge Denney’s Report and Recommendation (“R&R”) (ECF No. 62) granting-in-part Sherman’s Renewed Motion for Preliminary Injunction (ECF No. 47). For the reasons discussed herein, the Court overrules Defendants’ Objection, adopts Judge Denney’s R&R granting-in-part Sherman’s Motion (ECF No. 62) and, consistent with the R&R, defers ruling on the scope of the injunctive relief.

I. BACKGROUND

Donald Sherman, a descendant of the Minnesota Chippewa Tribe (Ojibwe) moves this court for a preliminary injunction allowing him to use a ceremonial sweat lodge on the grounds of NDOC's Ely State Prison ("ESP") to participate in his Native American religious practices. (ECF No. 47 at 2). Sherman has been condemned to death, and NDOC does not allow condemned Native American inmates to use the ceremonial sweat lodge at ESP because ESP's Operational Procedure ("OP") 810 states that all "CMU [Condemned Men's Unit] religious

1 activities [must] take place in the CMU housing unit.” (ECF No. 47-8 at 3).
 2 Defendants concede that not having access to the sweat lodge substantially
 3 burdens Sherman’s religious exercise but argue that they have a compelling
 4 interest in denying him access and that a total ban on sweat lodge access is the
 5 least restrictive means of regulating death row inmates and ensuring the safety
 6 and security of staff and inmates. Sherman argues that, despite his condemned
 7 status, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)¹
 8 renders NDOC’s total ban on his access to the ceremonial sweat lodge under any
 9 set of restrictions unlawful. *See* 42 U.S.C. § 2000cc-1.

10 After a hearing and supplemental briefing on the Motion for Preliminary
 11 Injunction, Judge Denney issued a R&R granting Sherman’s Motion insofar as it
 12 prayed for Sherman’s access to the sweat lodge and directed the parties to meet
 13 and confer as to the scope of that access. (ECF No. 62 at 21). In response,
 14 Defendants filed an Objection (ECF No. 63) which this Court now overrules.

15 **II. LEGAL STANDARD**

16 **A. De Novo Review of Magistrate Judge Report and Recommendation**

17 This Court “may accept, reject, or modify, in whole or in part, the findings or
 18 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a
 19 party timely objects to a magistrate judge’s report and recommendation, then the
 20 Court is required to “make a de novo determination of those portions of the [report
 21 and recommendation] to which objection is made.” *Id.* The Court’s review is thus
 22 de novo because Defendants filed their Objection. (ECF No. 63).

23 **B. Preliminary Injunction**

24 Injunctive relief, whether temporary or permanent, is an “extraordinary
 25 remedy, never awarded as of right.” *Winter v. Natural Res. Defense Council*, 555

27 ¹ Sherman originally brought three causes of action: two Free Exercise claims
 28 and one claim alleging violations of RLUIPA. The RLUIPA claim is the sole claim
 at issue in this order.

1 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary injunction must establish
 2 that he is likely to succeed on the merits, that he is likely to suffer irreparable
 3 harm in the absence of preliminary relief, that the balance of equities tips in his
 4 favor, and that an injunction is in the public interest.” *Am. Trucking Ass’ns, Inc.*
 5 *v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555
 6 U.S. at 20). Furthermore, under the Prison Litigation Reform Act (“PLRA”),
 7 preliminary injunctive relief must be “narrowly drawn,” must “extend no further
 8 than necessary to correct the harm,” and must be “the least intrusive means
 9 necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

10 A plaintiff who seeks a mandatory injunction—one that goes beyond simply
 11 maintaining the status quo during litigation—bears a “doubly demanding”
 12 burden: “she must establish that the law and facts clearly favor her position, not
 13 simply that she is likely to succeed.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740
 14 (9th Cir. 2015) (en banc). The Ninth Circuit has cautioned that mandatory
 15 injunctions are “particularly disfavored” and “should not issue in doubtful cases.”
 16 *Id.* (internal quotations omitted).

17 Finally, “there must be a relationship between the injury claimed in the
 18 motion for injunctive relief and the conduct asserted in the underlying
 19 complaint.” *Pac. Radiation Oncology, LLC v. Queen’s Medical Ctr.*, 810 F.3d 631,
 20 636 (9th Cir. 2015). “This requires a sufficient nexus between the claims raised
 21 in a motion for injunctive relief and the claims in the underlying complaint itself.”
 22 *Id.* The necessary connection is satisfied “where the preliminary injunction would
 23 grant ‘relief of the same character as that which may be granted finally.’” *Id.*
 24 (quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)).
 25 “Absent that relationship or nexus, the district court lacks authority to grant the
 26 relief requested.” *Id.*

27 **C. RLUIPA**

28 RLUIPA is “more generous to the religiously observant than the Free Exercise

1 Clause.” *Jones v. Slade*, 23 F.4th 1124, 1139 (9th Cir. 2022) (citations omitted).
 2 “To state a claim under RLUIPA, a prisoner must show that: (1) he takes part in
 3 a ‘religious exercise,’ and (2) the State’s actions have substantially burdened that
 4 exercise.” *Walker v. Beard*, 789 F.3d 1125, 1134 (9th Cir. 2015) (citing *Shakur v.*
 5 *Schrirro*, 514 F.3d 878, 888 (9th Cir. 2008)). If a prisoner shows that he takes part
 6 in a religious exercise and the State has substantially burdened that exercise, the
 7 burden shifts to the State to prove its actions were the least restrictive means of
 8 furthering a compelling governmental interest. *Id.* (citing *Warsoldier v. Woodford*,
 9 418 F.3d 989, 995 (9th Cir. 2005)).

10 RLUIPA defines religious exercise broadly to include “any exercise of religion,
 11 whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C.
 12 § 2000cc-5(7)(A); *see also Greene v. Solano Cnty. Jail*, 513 F.3d 982, 986 (9th Cir.
 13 2008). RLUIPA’s definition of religious exercise goes beyond abstract beliefs to
 14 include “physical acts [such as] assembling with others for a worship service [or]
 15 participating in sacramental use of bread and wine” *Walker*, 789 F.3d at
 16 1134 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

17 Because RLUIPA “reflects a congressional effort to accord heightened
 18 protection to religious exercise” it is to be “construed broadly in favor of
 19 protecting an inmate’s right to exercise his religious beliefs.” *Jones*, 23 F.4th at
 20 1140 (citing *Warsoldier*, 418 F.3d at 995).

21 **III. DISCUSSION**

22 Defendants object to the R&R on the following grounds: (1) Sherman failed to
 23 properly exhaust his administrative remedies; (2) Prohibiting Sherman access to
 24 the sweat lodge is supported by a compelling government interest and reflects the
 25 least restrictive means of furthering that interest; and (3) Sherman cannot show
 26 irreparable injury. Defendants correctly state that any injunctive relief permitting
 27 any kind of access to the sweat lodge would constitute “mandatory” injunctive
 28 relief because it would alter (as opposed to preserve) the status quo. *Garcia*, 786

1 F.3d 733, 740 (9th Cir. 2015) (en banc).

2 **A. Administrative Exhaustion**

3 Sherman exhausted his administrative remedies by sufficiently (and
 4 repeatedly) alerting prison officials that he seeks access to the sweat lodge. *See*
 5 *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2020) (“a grievance suffices if it
 6 alerts the prison to the nature of the wrong for which redress is sought.”) (quoting
 7 and adopting standard from *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)).
 8 The PLRA provides that “[n]o action shall be brought with respect to prison
 9 conditions under section 1983 of this title, or any other Federal law, by a prisoner
 10 confined in any jail, prison, or other correctional facility until such administrative
 11 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Sherman went
 12 through each of the three levels of ESP’s grievance process requesting, in various
 13 terms, access to the sweat lodge. (*See* ECF Nos. 47-18 to 47-23) Each time he
 14 was denied. Now, Defendants fault his first level grievance because he “fails to
 15 make any explicit demand to change the administrative regulation. . .” before
 16 faulting his second level grievance for requesting NDOC to “amend AR. 810, and
 17 allow me to sweat.” (ECF No. 63 at 20). Defendants argue that Sherman’s request
 18 to “allow me to sweat” would not allow “a prison official reading this grievance [to]
 19 ascertain that reasonable access to the sweat lodge is what’s intended.” (ECF No.
 20 63 at 20). It is clear from Sherman’s requests and Defendants’ denials that
 21 ultimate relief Sherman sought is to sweat; Defendants clearly understood his
 22 request because they denied Sherman’s grievances on the merits at each level.
 23 *See Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016) (holding that a prisoner
 24 exhausts available administrative remedies under the PLRA “despite failing to
 25 comply with a procedural rule if prison officials ignore the procedural problem
 26 and render a decision on the merits of the grievance at each available step of the
 27 administrative process.”)

28 For the foregoing reasons, the Court agrees with Judge Denney that Sherman

1 exhausted his administrative remedies as required by the PLRA.

2 **B. Likelihood of Success on the Merits**

3 Sherman seeks a mandatory injunction enjoining Defendants from enforcing
 4 their policy banning him, as a death row inmate, from using the sweat lodge.
 5 (ECF No. 47 at 23). Because such relief will alter the status quo, Sherman must
 6 therefore show that “the law and facts clearly favor [his] position, not simply that
 7 [he] is likely to succeed.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)
 8 (en banc). Sherman meets this exacting standard because he has shown that
 9 being denied access to the sweat lodge substantially burdens his religious
 10 exercise and Defendants fail to demonstrate that a total ban on Sherman’s access
 11 is the least restrictive means of serving a compelling government interest that is
 12 particular to him. Therefore, Sherman has shown that the law and facts clearly
 13 favor his position in this action.

14 **1. Substantial Burden**

15 While Defendants have conceded that a substantial burden on Sherman’s
 16 religious exercise exists, the Court addresses substantial burden for the sake of
 17 completeness. The Ninth Circuit has “little difficulty in concluding that an
 18 outright ban on a particular religious exercise is a substantial burden on that
 19 religious exercise.” *Greene*, 513 F.3d at 988 (citing *Murphy v. Mo. Dep’t of Corrs.*,
 20 372 F.3d 979, 988 (8th Cir. 2004)). The R&R found that “Defendants do not
 21 dispute that Plaintiff has sincerely held belief that he must participate in the
 22 Native American sweat lodge ceremony” and “likewise conceded that banning him
 23 from engaging in this practice because of his CMU status substantially burdens
 24 his religious exercise.” ECF No. 62 at 4. Defendants did not object to the R&R’s
 25 analysis and finding on that point, which this Court adopts. See ECF No. 62 at
 26 3-4 (discussing, inter alia, *Jones v. Slade*, 23 F.4th 1124 (9th Cir. 2022)).

27 Rather, Defendants object that banning Sherman from the sweat lodge
 28 furthers a compelling governmental interest and is the least restrictive means of

1 furthering that compelling governmental interest.

2 **2. Compelling Governmental Interest**

3 While Defendants point to a range of valid safety and operational concerns for
4 restricting access to the sweat lodge, they fail to articulate a compelling interest
5 in denying access to Sherman in particular. RLUIPA “requires the Government to
6 demonstrate that the compelling interest test is satisfied through application of
7 the challenged law ‘to the person’—the particular claimant whose sincere exercise
8 of religion is being substantially burdened.” *Holt v. Hobbs*, 574 U.S. 352, 363
9 (2015) (noting that RLUIPA and RFRA both contemplate an inquiry focused on
10 the individual) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726
11 (2014)). In light of RLUIPA, no longer can prison officials justify restrictions on
12 religious exercise by simply citing to the need to maintain order and security in
13 a prison.” *Greene*, 513 F.3d at 989-90.

14 Defendants must justify their policy of banning Sherman, a condemned
15 inmate, from using the sweat lodge. ESP has a sweat lodge and Defendants admit
16 that 23 convicted murderers with Level 1 Close Custody status could be eligible
17 to use the sweat lodge if they met the religious requirements. (ECF No. 59 at 2).
18 Defendants argue that condemned inmates pose a different kind of safety risk
19 (ECF No. 59 at 2); prison officials have determined that “CMU inmates can never
20 be Level 1” and, therefore can never be safe enough for being provided access to
21 the sweat lodge” (ECF No. 63 at 5); and as a condemned man, NDOC regulations
22 restrict Sherman’s activities far more than other convicted murderers who are
23 allowed to access the sweat lodge. (ECF No. 63 at 6).

24 Defendants have failed to articulate the marginal interest in enforcing the ban
25 on Sherman. *See Johnson v. Baker*, 23 F.4th 1209, 1217 (9th Cir. 2022) (“[T]he
26 government may not satisfy the compelling interest test by pointing to a general
27 interest—it must show the ‘marginal interest in enforcing’ the ban. . . .”) (quoting
28 *Holt*, 574 U.S. at 364). Defendants fail to address the marginal interest in denying

1 sweat lodge access to Sherman while allowing it to other convicted murderers
2 who use dangerous implements to construct a sweat lodge (ECF No. 63 at 9), are
3 concealed from view while they sweat (*Id.* at 11), and have a similar incentive to
4 escape. (*Id.* at 6). While Defendants undoubtedly have good reasons for keeping
5 condemned inmates separate from other inmates, Sherman does not seek to
6 intermingle with inmates assigned other classifications—he seeks to sweat.

7 While Defendants repeat their particularized reasons for denying Sherman
8 access to the sweat lodge, these do not justify the total ban. Defendants correctly
9 note that Sherman escaped from a different correctional institution twenty-five
10 years ago and committed a murder during that escape. (ECF No. 63 at 9-10).
11 Defendants contend that the restrictions they place on condemned inmates like
12 Sherman are responsible for his lack of escape attempts over the past twenty-five
13 years. (*Id.* at 10). Even if this is the case, Defendants do not explain how allowing
14 Sherman access to the sweat lodge would require the modification or elimination
15 of any of the restrictions placed on Sherman besides those contained in AR 810
16 and OP 810 that mandate religious exercises be performed inside the CMU.

17 Defendants also do not address Sherman’s record while incarcerated within
18 NDOC. With the exception of a twenty-one-year-old disciplinary finding that
19 Sherman possessed a recipe for methamphetamine (ECF No. 51 at 96) and two
20 dismissed disciplinary charges (*Id.* at 98-102) Defendants have submitted no
21 evidence of Sherman’s violent behavior while incarcerated within NDOC. As
22 Magistrate Judge Denney pointed out, Defendants do not dispute that Sherman
23 enjoys all of the CMU privileges possible under existing regulations, has not
24 demonstrated risk of violence or escape while in NDOC, served as the CMU
25 barber, and has been a member of the Inmate Advisory Committee for CMU
26 prisoners. (ECF No. 47-1 at 3-4).

27 Next, Defendants argue that the R&R failed to consider the burdens placed on
28 ESP and NDOC. (ECF No. 63 at 10). Judge Denney evaluated four burden-related

1 arguments made by Defendants: 1) every Correctional Emergency Response Team
2 (CERT) member on shift will be required to transport Sherman to the sweat lodge;
3 2) an additional officer would be required to man the closest tower to provide
4 additional security while Sherman uses the sweat lodge; 3) the Chaplain would
5 be required to stay inside or near the sweat lodge for the entire period Sherman
6 uses the lodge; and 4) allowing Sherman access to sweat will “compel the
7 institution to permit access to every other inmate. . . .” (ECF Nos. 62 at 11-15; 63
8 at 13). The Court addresses each in turn.

9 First, Defendants argue that every CERT team member on shift would be
10 required to transport Sherman to the sweat lodge because its location in the
11 prison’s “no man’s land” would trigger the manpower regulations applied to
12 “outside transportation.” (ECF No. 63 at 11). Judge Denney rejected this
13 argument because hearing testimony indicated the “CERT team is not utilized at
14 all when non-CMU inmates access the sweat lodge” and concluded that the AR
15 pertaining to transport of a maximum custody inmate outside the institution “has
16 no impact” here, where Sherman would stay *inside* ESP at all times while
17 accessing the sweat lodge. (ECF No. 62 at 11-12). Even if those outside
18 transportation regulations applied, Defendants have submitted no evidence that
19 *all* on-duty CERT members would be required to transport Sherman. The
20 transportation policies cited by Defendants allow maximum security inmates to
21 be transported outside the institution by two correctional officers. (ECF No. 51 at
22 71) (citing OP 424), including one armed officer (ECF No. 51 at 79) (citing AR
23 430.03). Defendants have not shown that that the total ban on access to the
24 sweat lodge is justified by the need for CERT presence.

25 Second, Defendants have not shown why an additional officer would be
26 required in the guard tower in their Objection. (See ECF No. 63 at 10-11). The
27 Court agrees with Judge Denney that Defendants have not substantiated their
28

claim of operational burden on this point.

Third, Defendants argue that the Chaplain would be required to remain in the sweat lodge for the duration of Sherman’s use because “no regulation contemplates giving access to one inmate at a time as would be required for Sherman.” (ECF No. 63 at 11). It does not follow that the absence of an existing regulation that would accommodate Sherman means the Chaplain, in particular, would be required to attend for the duration of Sherman’s ceremony. The OP 810.1 policy requires the Chaplain to “pass by a minimum of once every hour to observe the area” regardless of what classification of inmates are using the sweat lodge. (ECF No. 51 at 60). Therefore, Defendants have not substantiated their claim of operational burden regarding the Chaplain’s attendance.

Fourth, Defendants maintain that allowing Sherman to access the sweat lodge will open the floodgates to new RLUIPA claims.² AR 810 requires case-by-case determination of any special request (ECF No. 47-9 at 5) and the entire point of RLUIPA is to “make exceptions for those sincerely seeking to exercise religion.” *Yellowbear v. Lampert*, 741 F.3d 48, 62 (10th Cir. 2014). Judge Denney recommended that Sherman, and Sherman alone, may not be denied access to the sweat lodge based on his status as a condemned man. (ECF No. 62 at 21). Defendants are correct that sweat lodge materials pose a credible threat to NDOC staff each time they are used, which is why there are extensive regulations that govern access to the sweat lodge. (ECF No. 63 at 9). While there may be prisoners at every level of classification whose access to the sweat lodge would be lawfully prohibited based on their past conduct, Defendants have failed to show a compelling interest in preventing Sherman in particular from accessing the sweat lodge given his disciplinary record while housed within NDOC and their practice of allowing convicted murderers with good disciplinary records access to the

² Defendants admit that “there are no other CMU inmates currently seeking access to the sweat lodge.” (ECF No. 63 at 12.)

1 sweat lodge.

2 For the foregoing reasons, Defendants have not sufficiently demonstrated that
3 denying Sherman access to the sweat lodge is justified by compelling government
4 interests.

5 **3. Least Restrictive Means**

6 Even assuming a compelling government interest, Defendants bear the burden
7 of demonstrating that denying Sherman access to the sweat lodge “is the least
8 restrictive means” of furthering that compelling governmental interest. 42 U.S.C.
9 § 2000cc-1. As Magistrate Judge Denney pointed out, while it is true that prison
10 administrators are “accorded deference with regard to prison security” they must
11 also demonstrate they “actually considered and rejected the efficacy of less
12 restrictive measures before adopting the challenged practice.” *Greene*, 513 F.3d
13 at 989 (quoting *Warsoldier*, 418 F.3d at 999). “The least-restrictive-means
14 standard is especially demanding,’ and it requires the government to ‘sho[w] that
15 it lacks other means of achieving its desired goal without imposing a substantial
16 burden on the exercise of religion by the objecting part[y].” *Holt*, 574 U.S. at 364-
17 65. Defendants argue that a total ban on Sherman’s access to the sweat lodge is
18 the least restrictive means of “regulating maximum custody death row inmates
19 in a maximum custody institution” and ensuring the “safety and security of all
20 staff and inmates.” (ECF Nos. 50 at 14; 63 at 13-14). Because Defendants
21 articulate many of the same arguments in the operational burden and least
22 restrictive means sections of their briefing, the Court incorporates by reference
23 the compelling government interest section of this Order.

24 Defendants repeat their arguments regarding the need to regulate condemned
25 inmates and the anticipated burdens on staff and the prison chaplain if Sherman
26 were allowed to sweat. Regarding Defendants argument that Sherman cannot be
27 subject to the same policies as other inmates because condemned and non-
28 condemned inmates may not intermingle (ECF No. 63 at 14), Defendants fail to

1 response to Sherman’s proposal that he could sweat alone without intermingling
2 with non-condemned inmates (ECF No. 64 at 14). Defendants argue that
3 “correctional officers or staff cannot and should not be required to build and
4 operate the sweat lodge” (ECF No. 63 at 14), but fail to address the feasibility of
5 Sherman constructing the sweat lodge himself or with an approved volunteer.

Defendants further claim that “the Chaplain’s presence must be increased should Sherman have access to the sweat lodge.” (ECF No. 63 at 14). Defendants cite the Declaration of William Reubart, in which Reubart states that “if a CMU inmate is permitted access to the sweat lodge, then the institutional chaplain is required to attend for the entire period per current procedures.” (ECF No. 51 at 64). It is unclear how this can be the case, as Defendants argue that “there is no existing procedure that clearly lays out CMU access to the sweat lodge. . . .” (ECF No. 63 at 11). Regardless, OP 810.1 requires the Chaplain to “pass by a minimum of once every hour to observe the area” regardless of what classification of inmates are using the sweat lodge. (ECF No. 51 at 60). Therefore, Defendants’ objection on this point is not particularized to Sherman; it is unclear how mandating the Chaplain pass by a minimum of every half-hour, or even every fifteen minutes, would preclude his presence at simultaneous religious ceremonies elsewhere at ESP any more than the existing operational procedure does for non-condemned inmates.

Finally, Defendants understandably focus on the burden imposed by granting Sherman one-time as opposed to more frequent access to the sweat lodge. Defendants concede that allowing Sherman access to the sweat lodge once prior to his execution would be “manageable in a one-time event.” (ECF No. 63 at 15). While more frequent access would be more burdensome, the frequency of access has neither been demanded by Sherman nor set by the Court.³ Rather Sherman

²⁷ ³ For example, in *Fowler v. Crawford*, the Eighth Circuit found prohibiting

1 opposes the total ban and it is clear that condemned inmates are already
 2 transported around the prison for secular purposes without unduly burdening
 3 Defendants. (ECF No. 62 at 13).

4 Defendants have not met their burden to demonstrate that a total ban on
 5 Sherman's access to the sweat lodge is the least restrictive means of satisfying a
 6 compelling government interest. Accordingly, Sherman has shown that "the law
 7 and facts clearly favor [his] position, not simply that [he] is likely to succeed."
 8 *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). As explained
 9 above, Defendants' have conceded that their policy banning Sherman from
 10 accessing the sweat lodge substantially burdens his religious exercise.
 11 Defendants fail to demonstrate that a total ban on Sherman's access *in particular*
 12 is the least restrictive means of serving a compelling government interest.
 13 Therefore, Sherman has shown that the law and facts clearly favor his position
 14 in this action.

15 **C. Irreparable Injury**

16 The Court next considers whether Sherman has shown irreparable injury.
 17 Citing *Allen v. Toombs* 827 F.2d 563, 567 (9th Cir. 1987), Defendants maintain
 18 that prohibiting access to a sweat lodge does not violate the First Amendment
 19 under Ninth Circuit precedent and that Sherman therefore cannot demonstrate
 20 irreparable injury. (ECF No. 63 at 16). Defendants' reliance on *Allen* is inapposite
 21 as that case predated RLUIPA and subsequent Supreme Court jurisprudence
 22 expressly rejects their arguments.

23 As Judge Denney recognized, the Supreme Court in *Warsoldier*, which
 24 considered irreparable harm under RLUIPA, held that when a plaintiff "raise[s] a
 25 colorable claim that the exercise of his religious beliefs has been infringed, he has

26
 27 a sweat lodge at a maximum-security facility did not violate RLUIPA when the
 28 Plaintiff made an "all or nothing" request to sweat a minimum of seventeen times
 per year. 534 F.3d 931, 933-34, 940 (8th Cir. 2008).

1 sufficiently established that he will suffer an irreparable injury absent an
 2 injunction.” 418 F.3d at 1002.

3 Defendants also argue that Sherman will not experience irreparable injury
 4 because he is “permitted to practice is [sic] religion in all ways in his unit.” (ECF
 5 No. 63 at 16). This is immaterial to the analysis because RLUIPA’s plain language
 6 forbids the court “from evaluating the centrality of a religious practice or belief.”
 7 *Johnson*, 23 F.4th at 1214-15 (citing 42 U.S.C. § 2000cc-5(7)(A)). “[I]t makes no
 8 difference that a prisoner may still practice his ‘religion as a whole’ under the
 9 State’s restrictions. . . what matters is whether a regulation ‘burden[s] a
 10 particular facet of [the prisoner’s] religious practice.’ *Id.* at 1215 (citing *Greene*,
 11 513 F.3d at 987). Sherman is a member of a land-based religion and he is being
 12 prohibited entirely from accessing a land-based ritual practice. He has
 13 sufficiently established that he will suffer an irreparable injury here, even if he is
 14 allowed to practice other tenants of his religion inside the CMU.

15 Defendants further claim that no irreparable harm will beset Sherman
 16 because he has prayed for money damages. (ECF No. 63 at 16). Judge Denney
 17 considered and rejected that argument on the ground that RLUIPA only allows
 18 for injunctive relief. (ECF No. 62 at 18-19).

19 Because Sherman has asserted a colorable claim of infringement on his
 20 exercise of his religious beliefs, he has sufficiently established he will suffer
 21 irreparable injury in the absence of injunctive relief.

22 **D. Balance of Equities and Public Interest**

23 Regarding the equities, Sherman argues that his constitutional rights will
 24 continue to be violated absent an injunction (ECF No. 64 at 20) while Defendants
 25 argue that prohibiting Sherman from accessing the sweat lodge ensures the
 26 safety of ESP. (ECF No. 63 at 16). Sherman has the better of the arguments here
 27 because, as discussed above, Defendants have not shown that restrictions on
 28 Sherman *in particular* serve a compelling government interest.

1 “The third and fourth factors of the preliminary-injunction test—balance of
2 equities and public interest—merge into one inquiry when the government
3 opposes a preliminary injunction.” *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th
4 Cir. 2021) (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir.
5 2014)). “The ‘public interest’ mostly concerns the injunction’s ‘impact on
6 nonparties rather than parties.’” *Id.* (quoting *Bernhardt v. L.A. Cnty.*, 339 F.33d
7 920, 931 (9th Cir. 2003)).

8 On balance, the equities and public interest favor Sherman. Courts have
9 acknowledged that ensuring respect for the constitutional rights of inmates like
10 Sherman is in the public interest. *See Melendres v. Arpaio*, 695 F.3d 990, 1002
11 (9th Cir. 2012) (“[I]t is always in the public interest to prevent the violation of a
12 party’s constitutional rights.” (citation omitted); *Preminger v. Principi*, 422 F.3d
13 815, 826 (9th Cir. 2005) (“Generally, public interest concerns are implicated when
14 a constitutional right has been violated, because all citizens have a stake in
15 upholding the Constitution.”)

16 Courts have found as a matter of law that the government does not have a
17 compelling interest in an absolute prohibition on sweat lodge access for an
18 individual inmate. *See, e.g., Yellowbear*, 741 F.3d 48; *Pasaye v. Dzurenda*, 375
19 F. Supp. 3d 1159 (D. Nev. 2019), *on reconsideration in part*, No. 2:17-CV-02574-
20 JAD-VCF, 2019 WL 2905044 (D. Nev. July 5, 2019). Sherman’s request is typical
21 of a request for injunctive relief under RLUIPA in which a court orders
22 institutional defendants to provide an exception to an existing policy to uphold
23 the constitutional rights of the incarcerated. *See, e.g., Holt*, 574 U.S. at 369-70
24 (finding Defendant’s grooming policy violated RLUIPA insofar as it prevented
25 petitioner from growing a ½-inch beard in accordance with his religious beliefs);
26 *Johnson*, 23 F.4th at 1218 (affirming district court’s injunction ordering Nevada
27 prison officials to allow plaintiff to possess ½-ounce of scented oil in his cell for
28 personal use with his prayers).

1 The Court agrees with Judge Denney that Sherman's rights will continue to
2 be infringed without an injunction, and Defendants have not shown sufficient
3 evidence that allowing Sherman in particular to sweat will impact the safety and
4 security of ESP. Therefore, the Court finds that the balance of equities tips in
5 Sherman's favor and that an injunction is in the public interest.

6 **E. PLRA**

7 Although Defendants argue that granting Sherman any access to the sweat
8 lodge will violate the PLRA (ECF No. 63 at 21), Sherman correctly observes that
9 this argument is premature because the specifics of the relief Sherman is
10 requesting, including the frequency and terms of access, are not yet before the
11 Court. (ECF No. 64 at 21). The PLRA requires that preliminary injunctive relief
12 must be "narrowly drawn," must "extend no further than necessary to correct the
13 harm," and must be "the least intrusive means necessary to correct the harm."
14 18 U.S.C. § 3626(a)(2). Judge Denney recommended that Sherman be granted
15 access to the sweat lodge but noted that "the court cannot conclude that access
16 should be unfettered, and Plaintiff's request, as it stands, is overbroad." (ECF No.
17 62 at 21). Judge Denney further recommended that the parties be ordered to
18 meet and confer regarding the specifics of Sherman's access to the sweat lodge.
19 (*Id.*) The Court agrees with Judge Denney that Defendants' blanket refusal to
20 allow Sherman access to the sweat lodge violates RLUIPA, and further agrees that
21 it must defer ruling on the preliminary injunction until the scope of requested
22 relief is clearly before the Court.

23 **IV. CONCLUSION**

24 IT IS THEREFORE ORDERED THAT Judge Denney's Report and
25 Recommendation (ECF No. 62) is adopted in full.

26 IT IS FURTHER ORDERED that Sherman's Motion for Preliminary Injunction
27 (ECF No. 47) is granted insofar as Sherman should be granted access to the sweat
28 lodge.

1 IT IS FURTHER ORDERED THAT the parties meet and confer regarding the
2 specifics of Sherman's access to the sweat lodge. If the parties come to an
3 agreement regarding the scope of that access, they shall file a stipulation
4 outlining their agreement for the Court's approval within 21 days of the date of
5 this Order. If the parties cannot come to an agreement, they shall file a notice
6 indicating the same within in 21 days of the date of this Order, and Judge Denney
7 may order supplemental briefing or additional hearings as appropriate and issue
8 a report and recommendation for the parameters of the relief.

9 IT IS FURTHER ORDERED THAT Defendants' Objection (ECF No. 63) is
10 overruled with the exception of Defendants' arguments regarding the permissible
11 scope of the injunction under the PLRA, which this Court defers ruling on until
12 the parties have stipulated to the parameters of the relief or Magistrate Judge
13 Denney has issued a report and recommendation regarding the permissible scope
14 of the relief requested.

15 IT IS FURTHER ORDERED THAT the Court defers ruling on Sherman's
16 Renewed Motion for Preliminary Injunction (ECF No. 47) until after the scope of
17 the relief requested is defined before the Court.

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19 DATED THIS 29th day of March 2023.
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23 ANNE R. TRAUM
24 UNITED STATES DISTRICT JUDGE
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